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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Calvin W. Breit
C. Arthur Rutter, Jr.
BREIT, RUTTER & MONTAGNA
720 Atlantic National Bank Bldg.
415 St. Paul's Blvd.
Norfolk, Virginia 23510
Attorneys for Petitioner
Stanley D. Edmonds

I N D E X

Subject Index

	Page
Opinions Delivered in the Courts Below	1
Jurisdiction	3
Question Presented	4
Statutory Provisions	4
Statement of the Case	6
Reasons Relied on for Allowance of the Writ	8
(1) The Court of Appeals has rendered a decision in conflict with the decisions of the other Courts of Appeals on the same matter.	8
(2) The Court of Appeals decision herein conflicts with decisions of this Court	17
(3) The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court.	20
Conclusion	24
Appendix	

CITATIONS

Cases

Page

Albert v. Paulo, 552 F2d 1139 (5th Cir. 1977). 12

Brown v. Ivarans Rederi A/S, 545 F2d 854 (1976) 15

Cooper Stevedoring Company v. Kopke, 417 U.S. 106 (1974) 18

Croshaw v. Koniklijke Nedlloyd, B.V. Rijawijk, 398 F.Supp. 1224 (D. Ore. 1975) 11

Dobbins v. Crain Brothers, Inc., 567 F2d 559 (1977) 15

Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976) 11

Halcyon Lines v. Haenn Ship Ceiling and Refiting Corporation, 342 U.S. 282 (1952). 17,18

Howard v. Romen, Inc., 442 F.Supp. 1142 (S.D. Ala. 1977). 13

Hubbard v. Great Pacific Shipping Company, Monrovia, 404 F.Supp. 1242 (D. Ore. 1975) 11

Landon v. Lief Hoegh and Company, Inc. 521 F2d 756 (1975), cert. denied 423 U.S. 1053 (1976) 13,14

Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 795 (E.D. Pa. 1974). 14,15

Marrant v. Farrell Lines, Inc.,
550 F2d 142 (3rd. Cir. 1977). . . .13

Northeast Marine Terminals, Inc.
v. Caputo, 432 U.S. 249 (1977). . .23

Pope and Talbot Inc. v. Hawn, 346
U.S. 406 (1953) 17

Samuels v. Empresa Lineas Martimas
Argentinas, 573 F2d 884 (1978). . .12

Shellman v. U.S. Lines, Inc., 528
F2d 675 (1975), cert. denied, 425
U.S. 936 (1976) 11

Shepler v. Weyerhaeuser Company,
569 P2d 1040 (Ore. 1977). 16

Zapico v. Bucyrus-Erie Company,
No. 77-7533 (decided June 15,
1978) 14

Other

33 U.S.C. Section 905
Section 5(a). 4
Section 5(b). 5

IN THE SUPREME COURT
OF THE
UNITED STATES

No.

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner, a longshoreman, received benefits under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S. C. Section 901 et seq. for injuries received aboard defendant's vessel. Additionally he brought the instant suit

against the defendant vessel owner for negligence. That suit was tried with a jury in the United States District Court for the Eastern District of Virginia, Norfolk Division, before the Honorable Richard B. Kellam, District Judge on March 6, 7th and 10th, 1975. A verdict in the amount of $97,500.00 was rendered against the vessel owner (by Order dated September 3, 1975). The Court set aside the verdict and ordered a new trial.

On December 16, 1975, a new trial with a jury was had before the Honorable John A. McKenzie, District Judge, and a verdict was returned against the vessel owner in the amount of $100,000.00. The amount of the verdict was reduced to $90,000.00 on the finding of 10% contributory fault of the plaintiff, and judgment was entered in that amount by Order dated March 3, 1976. The matter was appealed by defendant in the District

Court to the Court of Appeals for the Fourth Circuit. A panel of the Fourth Circuit in an Opinion dated May 6, 1977 limited the vessel owner's liability to "the extent of its fault, in this case $20,000.00." 558 F2d at 189; App. at p.26. Rehearing en banc was granted on June 3, 1977. The en banc decision of the Fourth Circuit, decided June 22, 1978, reversed the District Court's entry of judgment in the amount of $90,000.00 and remanded the case for entry of judgment against the shipowner for $20,000.00 and for further deliberation on the distribution of $20,000.00 between the longshoreman and the stevedore. All pertinent opinions are appended.

JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is

June 22, 1978. That decision was the result of the Fourth Circuit's en banc rehearing of the decision rendered May 6, 1977, by a panel of that court. No rehearing of the June 22, 1978 decision has been requested and no extention of time has been requested.

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Does 33 U.S.C. Section 905(b), as amended in 1972, permit a reduction in a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurring negligence on the part of the longshoreman and his stevedore employer?

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5. (a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his

legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or

indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

STATEMENT OF THE CASE

Stanley Edmonds was employed by Nacirema Operating Company, a stevedoring company, as a longshoreman to assist in the unloading of the vessel SS ATLANTIC

COGNAC, owned by the defendant Compagnie Generale Transatlantique, while the vessel was docked at Portsmouth Marine Terminals, Portsmouth, Virginia, on March 3, 1974. While performing his duties Edmonds sustained serious and permanent injuries when a container which he was behind rolled back, crushing him against the bulkhead of the vessel. A mate employed by the vessel had ordered Edmonds behind the container to remove a jack which had been placed there for stability during the voyage from Europe. A "hustler" operated by a fellow longshoreman, in clear view of the mate, had at approximately the same time circled in the hold of the vessel and backed into the container causing it to roll back on Edmonds. The air brakes on the container were inoperable because a pet cock had been left open apparently when the container was loaded on the vessel

in Rotterdam. Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia existed by virtue of Title 28, U.S.C.A. 1332 on the grounds of diversity of citizenship and the amount in controversy.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Court of Appeals has rendered a decision in conflict with the decisions of the other Courts of Appeals on the same matter.

The question of whether Section 905(b) of the Longshoremen's Act permits a reduction in the damages for which a shipowner is liable to a longshoreman to an amount equal to the shipowner's proportion of fault has been answered in the negative by every Court of Appeals which has considered the question in a maritime context, except for the Fourth Circuit. The Ninth Circuit, the Fifth

Circuit and the Second Circuit (ruling by way of dictum) have all rejected any reduction of a shipowner's liability because of concurrent stevedore negligence. The Third Circuit has repeatedly noted the criticisms of the proportionate fault scheme, though it has not yet ruled on that question. The District Courts in these circuits have reached decisions in accord with the Courts of Appeals. Only in the Fourth Circuit has a maritime case been decided contrary to that position; only in the Fourth Circuit does a shipowner reduce his damages at the longshoreman's expense, by demonstrating some concurrent fault on the part of the stevedore. The anomalous result was very aptly described by Judge Hall, dissenting from the Edmonds majority, when he said:

> "For the longshoreman himself, the amount of his tort recovery now becomes

> totally dependent on a new and judicially created 'situs test' from the border of Washington State past Texas, Louisiana, and North to Georgia, and from Delaware to Maine, the injured longshoreman recovers the full award against a vessel, reduced only by his own contributory negligence. The maritime areas of the states which comprise the Fourth Circuit now stand alone in their reduction of the longshoreman's damage award due to the negligence of the stevedoring company." Slip Opinion at 15, App. at p. 67.

This result is particularly inappropriate in view of the intention of Congress that the Act be applied uniformly throughout all jurisdictions. It is equally inappropriate in that the stevedore is not a party to the suit and has no opportunity to present evidence to negate any finding as to its negligence. A review of the cases decided by the other Courts of Appeals points out both the aberrant nature of the Edmonds holding and the difference in recovery

rights that it creates between longshoremen in the Fourth Circuit and longshoremen elsewhere.

A review of the Ninth Circuit reveals: Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976) and Shellman v. U.S. Lines, Inc., 528 F2d 675 (1975), cert. denied, 425 U.S. 936 (1976), the Court rejected any reduction of the longshoreman's recovery against the vessel on account of stevedore negligence.

The same result has been obtained in District Court cases. Hubbard v. Great Pacific Shipping Company, Monrovia, 404 F.Supp. 1242 (D. Ore. 1975), rejected any reduction in the vessel's liability on the ground that it would negate the congressional intent embodied in the 1972 Amendments to avoid circuitous suits. The Court in Croshaw v. Koniklijke Nedlloyd, B.V. Rijawijk, 398 F.Supp. 1224

(D. Ore. 1975) followed Hubbard, though Judge Skopil personally would have preferred a different result.

A review of the Fifth Circuit reveals: Samuels v. Empresa Lineas Martimas Argentinas, 573 F2d 884 (1978), where the Court adopted the reasoning of the Ninth Circuit, concluding that to reduce the vessel's liability because of the employer's negligence would reduce the award of the plaintiff, the one person who is blameless. The Court rejected any reduction of the vessel's liability.

That same conclusion was reached in a different fashion in the earlier case of Albert v. Paulo, 552 F2d 1139 (5th Cir. 1977), where the Court permitted full recovery of the stevedore's insurer's lien without regard to the stevedore's concurring negligence.

The same conclusion was reached by

the District Court in Howard v. Romen, Inc., 442 F.Supp. 1142 (S.D. Ala. 1977).

A review of the Second Circuit reveals: In Landon v. Lief Hoegh and Company Inc., 521 F2d 756 (1975), cert. denied 423 U.S. 1053 (1976), the Court noted its opinion that some negligence on the employer's part would not cut off the longshoreman's right to sue the ship. The Court also noted that a reduction in the shipowner's liability to the longshoreman on account of compensation payments would be the substantial equivalent of contribution by the employer. The Court's language in Landon leads to the conclusion that the Second Circuit "will not follow an 'equitable credit' doctrine or any similar apportionment of liability in Section 905(b) cases under the 1972 Amendments." See Judge Van Dusen, concurring in Marrant v. Farrell Lines, Inc., 550 F2d 142 (3rd. Cir. 1977).

More recently, in Zapico v. Bucyrus-Erie Company, No. 77-7533 (decided June 15, 1978), the Second Circuit stated that:

> "We think that Landon v. Lief Hoegh does commit us . . . against any 'credit' that by considerably reducing the longshoreman's award from a negligent non-employer might impair the right of even a negligent employer fully to recoup his compensation payments out of that award." (Slip Opinion at 20).

Thus the Second Circuit has rejected (at least by way of dictum) any reduction in the vessel's liability.

A review of the Third Circuit reveals: In Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974), the Court thoroughly reviewed the adoption of the 1972 Amendments. The Court concluded that any reduction of the vessel's liability because of stevedore negligence would contravene the intent of Congress in the Amendments. Id. at 768-69. This view found support from

that Court of Appeals in Brown v. Ivarans Rederi A/S, 545 F2d 854 (1976), where the Court said in a footnote that the equitable credit theory appeared to be inconsistent with the conclusion reached in Lucas. Id. at 858, n. 6. The Third Circuit also noted there that the equitable credit doctrine was generally rejected by the courts which considered it.

The Court declined to decide the question in Marrant, supra, calling it still "very much an open question" 550 F2d at 147. However, in Dobbins v. Crain Brothers Inc., 567 F2d 559 (1977), the Court noted that the "equitable credit" theory had been criticized in Marrant and Brown and had been rejected by Shellman, Dodge, and Lucas. Thus, despite repeated opportunities to adopt the "equitable credit" the Third Circuit has refrained from doing so and has recognized

the criticisms of the application of that doctrine.

In addition, even in state courts which have considered the equitable credit approach under the Longshoremen's Act, the doctrine has been rejected. See Shepler v. Weyerhaeuser Company, 569 P2d 1040 (Ore. 1977), where the Oregon Supreme Court refused to allow an off-set to the vessel because of stevedore negligence.

In summary, the Fourth Circuit's adoption of a reduction in the vessel owner's liability because of concurrent stevedore negligence stands by itself among the maritime Courts of Appeals which have considered the issue. The sharp conflict between the decisions of the various other Courts of Appeals and the Fourth Circuit's approach should be resolved by the Supreme Court through a review of the Fourth Circuit's opinion

herein.

(2) The Court of Appeals decision herein conflicts with decisions of this Court.

It is a rule long established by this Court that a shipowner is not entitled to contribution from a joint tortfeasor, where that joint tortfeasor is a stevedore employer covered by the Longshoremen's Act. Halcyon Lines v. Haenn Ship Ceiling and Refiting Corporation, 342 U.S. 282 (1952). There, the Court rejected the vessel owner's contention that a stevedore employer should be liable for a contribution based upon the relative degree of fault of each. This Court properly focused on the fact that Congress stopped short of approving the contribution urged by the vessel and the Court declined to approve such a doctrine without congressional action.

In Pope and Talbot Inc. v. Hawn,

346 U.S. 406 (1953), this Court also refused to permit a reduction of the vessel's liability by the amount of compensation payments made to the longshoreman by the stevedore. The Court characterized any such reduction in the vessel's favor as the substantial equivalent of contribution, which the Court had declined to require in Halcyon. Id. at 412.

More recently, this Court has reaffirmed its ruling in Halcyon that contribution from the employer is inappropriate. In Cooper Stevedoring Company v. Kopke, 417 U.S. 106, (1974), this Court did allow contribution by a non-employer joint tortfeasor. However, the Court reaffirmed it holding that employers under the Longshoremen's Act were not subject to such contribution. Id. at 113. The Court was careful to point out that "Halcyon was, and still

is, good law on its facts." Id. at 115.

However, despite this historical rule against contribution by the stevedore employer at the expense of the employee, the Fourth Circuit Opinion does require contribution or its essential equivalent. The vessel's liability is reduced by the proportion of stevedore fault, thereby reducing the longshoreman's recovery and reducing the ability of the longshoreman to repay the compensation lien of his employer. In a large number of cases, the longshoreman's total recovery from the vessel, after the application of the Fourth Circuit's "inequitable diminution," will be less than the compensation lien. This will be particularly likely to occur where the compensation lien is quite substantial. Such an impairment of the stevedore's lien is the functional equivalent of contribution, which this Court has held is inappropriate

under the Longshoremen's Act. The Fourth Circuit's Opinion should therefore be reviewed by this Court to bring it into conformity with prior decisions of this Court.

(3) The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court.

Congress, when it enacted the 1972 Amendments to the Longshoremen's Act, intended that legal questions arising under the negligence action should be determined as a matter of Federal Law. That Federal Law is currently in a state of tremendous uncertainty because of the Fourth Circuit's Opinion. Stevedores are uncertain of their role in suits by longshoremen against shipowners. Longshoremen are uncertain whether or not to vigorously defend the stevedore's action that brought about their injuries.

Should stevedores participate in the trial in an effort to protect their compensation liens or does that bring back the circuitous three party suits Congress abolished in 1972? Carriers are unsure how to cover stevedore compensation risks, or exactly what risks it is the stevedores need to have covered. Uncertainty about the status and amount of the compensation lien makes the setting of rates difficult. Vessel owners are unsure what third party risks to insure against. And the setting of cargo rates by vessel owners and of contract rates by stevedores must be recalculated in view of the Fourth Circuit's ruling. Needless to say these rates may well be different in the Fourth Circuit than elsewhere because the risks of the various parties are now so different in the Fourth Circuit.

Longshoremen are denied the full benefit of the negligence remedy enacted

by Congress and must bear the burden of any inequity in the Edmonds ruling. Longshoremen face the additional burden of having to show that the stevedore was free from negligence, a burden imposed upon no other plaintiffs under land-based law. The courts are caught up in the uncertainty as well, for settlement of longshoremen's negligence suits is now made more complicated and in fact differs from court to court. Now all parties to the suit, and stevedore non-parties, must attempt to estimate the effect of stevedore negligence, if any, and factor that calculation into any settlement discussions. If the private settlement of disputes is to be judicially encouraged, the Fourth Circuit approach is counterproductive.

The 1972 Amendments made many substantial revisions in the Longshoremen and Harbor Workers' Compensation Act.

As the law is applied in a variety of cases by a variety of courts, it is only logical to expect that from time to time the Supreme Court will be called upon to provide guidance on particular matters. For example, after several years of development by the lower courts on the issue of "jurisdiction" of the Act after the Amendments, it was necessary for this Court to speak decisively. That was accomplished by the Court in Northeast Marine Terminals, Inc. v. Caputo, 432 U.S. 249 (1977). Through that opinion, the Court largely resolved disputes as to coverage under the Act. That decision by the Court essentially settled an important question of Federal Law.

The same kind of judicial determination is now necessary with respect to the negligence remedy under Section 905 of the Act. Review by this Court of the Edmonds Opinion will provide the kind

of guidance necessary to bring stability and uniformity to the nation's maritime industry. Once the Section 905 negligence remedy is clarified by this Court, the entire industry--vessel owners, stevedores, and longshoremen--can go about the business of maritime commerce knowing exactly what the respective rights and duties of the various parties are under the law. Such a state of certainty can only benefit the entire maritime industry. This important question of Federal Law should be settled by this Court, through a review of the Fourth Circuit's Opinion herein.

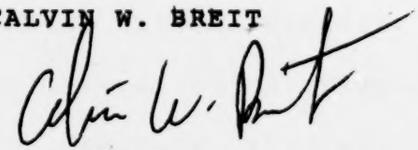
CONCLUSION

The decision of the Court of Appeals herein creates an injustice to longshoremen by reducing the vessel's liability by the proportion of any stevedore fault, contrary to the decisions of the otner

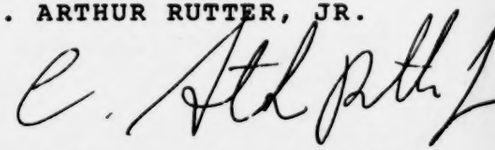
Court's of Appeals which have considered the issue and contrary to the previous holdings of this Court. A Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit herein.

Respectfully submitted,

CALVIN W. BREIT



C. ARTHUR RUTTER, JR.



Attorneys for Petitioner
Stanley D. Edmonds

CERTIFICATE OF SERVICE

I, C. Arthur Rutter, Jr., certify that on or before 11th day of September 1978, I mailed, postage prepaid, 40 copies of this Petition for Certiorari to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commerical Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent.

C. Arthur Rutter

APPENDIX

APPENDIX INDEX

Page

Memorandum Order of Judge Richard B. Kellam, dated September 3, 1975 . . A1

Memorandum Order of Judge John A. MacKenzie, dated March 3, 1976. . . A15

Panel Decision, Fourth Circuit Court of Appeals, dated May 6, 1977. . . . . A22

En Banc Decision, Fourth Circuit Court of Appeals, dated June 22, 1978. . . . . A49

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

STANLEY D. EDMONDS, Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 74-339-N
COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.	:	MEMORANDUM ORDER

Stanley D. Edmonds obtained a jury verdict in his action against defendant for alleged negligence. Defendant moves to set the verdict aside and to enter judgment for it or, in the alternative, grant it a new trial. Defendant contests the sufficiency of the evidence and asserts there were errors in the granting in the charge to the jury.

The accident occurred March 3, 1974, and is, therefore, governed by the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Sec. 901, et seq., which became effective November 26, 1972.

Plaintiff contended defendant had been negligent in (1) permitting containers to be loaded on its ship without having the air brakes on the containers applied, and (2) the action of the ship's crew in directing plaintiff to remove a jack from behind a container when a hustler was ready to engage the container.

Defendant's ship, the SS ATLANTIC COGNAC, was loaded at Rotterdam by stevedores employed for that purpose. Containers were rolled aboard the ship and secured in place by 12 to 18 chains, and jacks which blocked the wheels. Some containers have an air-braking system which can be hooked up to the trailer-tractor combine to control the movement of the trailer, principally when applied on the highway. After the trailer is in place aboard the ship, its air brakes may be applied to assist in holding the container steady.

On the occasion in question, Nacirema

Operating Company, Inc., was employed to unload the ship. One Hyman was in charge of the stevedores, and decided the method to be used in removing the containers. A hustler was used to pull the containers off the ship onto the wharf and to the storage area. The hustler would back up and engage the container and proceed to pull it off the ship. Among the duties of the longshoremen was that of removing the chains and jacks from the containers. As the longshoremen were preparing to remove one of the few remaining containers, plaintiff said a member of the ship's crew came around. Seeing a jack behind one of the containers, he said the ship's crewman directed him to remove it. The back of this container was about two feet from the side of the ship. Plaintiff says that as he went between the rear of the container and the side of the ship to remove the jack, the hustler backed into the

container causing the container to roll back, pinning him against the side of the ship and inflicting injuries on him.

Plaintiff contends that if the air brakes had been applied to the container when it was stowed in Rotterdam, it would not have rolled back when the hustler backed into it. There was no evidence the ship's crew knew the air brakes were not applied. But plaintiff says that in the exercise of ordinary care in seeing that the containers were properly stowed, the ship should have known the air brakes were not fixed. Defendant says that it was the duty of the stevedores to determine whether the air brakes were applied; that the air brakes are for use on the highway and not for holding the container in place, because the container is chained and chocked in place; that all containers are not equipped with brakes and that even if it had knowledge the air brakes were

not fixed, it had no duty to warn the longshoremen as they could easily determine this issue and it was their duty to do so.

While defendant says there has been no showing it was guilty of negligence, it says even if there were such a showing, the court erred in the charge given the jury. It complains in particular of the following:

Charge A

> "A vessel owner, under admiralty law, owes the duty of exercising ordinary care towards all persons lawfully aboard the vessel, and the defendant has the duty of seeing that the cargo is properly stowed, and he is charged with whatever knowledge it, the defendants, would have acquired as to the nature and characteristics

of the cargo carried on the vessel by the exercise of ordinary care to acquaint themselves with the facts and the defendant was bound to take reasonable precautions in light of such knowledge to protect longshoremen like the plaintiff, Stanley D. Edmonds, who was employed to assist in unloading the cargo."

Charge B

"If you find from a preponderance of the evidence that the plaintiff was injured when a container moved into him and if you further find from a preponderance of the evidence that the defendant's mate, while sup-

ervising and reviewing the unloading operation directed or ordered the plaintiff to remove a jack in the vicinity of his injury at the time when he knew or should have known that the container was then and there being moved by a hustler, then the defendant was guilty of negligence."

Defendant says that Charge "A," in effect, told the jury that the defendant had a duty to provide the longshoremen with a safe place to work. As to Charge "B," defendant says it is not supported by the evidence, is an incorrect statement of the law, and is misleading.

- A -

The Fourth Circuit made it clear in Bess v. Agromar Line, ___F.2d___(July 7,

1975), that the traditional absolute liability for breach of the non-delegable duty to provide those who come aboard its vessel a safe place in which to work was an outgrowth of the doctrine of seaworthiness, "and differs significantly from the concept of negligence." Now the longshoreman is prohibited from bringing an action against the ship based on the warranty of seaworthiness or a breach thereof. In the Bess case, supra, the court referred to the legislative history of the 1972 amendment, and quoted the following from that history:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action

> is concerned, and not to endow him with a special maritime theory of liability or cause of action under whatever judicial nomeclature it may be called, such as 'unseaworthiness,' 'non-delagable duty,' or the like." House Report No. 92-1441, 92d Congress, 2d Session (1972).

Hence, it is clear that the duty owed to the longshoreman is no different from that "in non-maritime employment ashore," and he is not endowed "with any special maritime theory of liability or cause of action." The Charge "A" above told the jury the shipowner had the "duty of seeing that the cargo is properly stowed;" and that the ship was chargeable with whatever knowledge it would have acquired as to the nature and character-

istics of the cargo, and in the exercise of ordinary care, it should acquaint itself with the facts.

The effect of this charge was to place the owner of a vessel in a different class and impose a greater duty on him than is imposed upon nonmaritime employers. The legislative history makes it clear that all such claims are pursuant to the common law, and of equal dignity to other negligent claims. The history, 92d Congress, 2d Session (1972), vol. 3, page 4704, pointed out:

> "So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish:

(1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."

Continuing, the report said it was intended the ship would "not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a

land-based third party in a nonmaritime pursuit liable under similar circumstances." Id. p. 4704.

In this case, and as the court pointed out in the Bess case, supra, "[t]he allegedly unsafe condition was the result of the loading process which was under the sole control of the independent stevedoring contractor." There was no evidence the ship had any knowledge that the air brakes had not been applied. Whatever the ship could have learned from inspection, the stevedore could have learned. There is not now any greater duty owing by the ship to the longshoreman than is owed by land-based landowners to invitees. See Citizen v. M/V TRITON, 384 F.Supp. 198 (D.C. Tex. 1974); Ramirez v. Toko Kaiun K.K., 385 F.Supp. 644 (N.D. Cal. 1974). The longshoreman no longer has a cause of action against the shipowner for alleged failure to provide him a safe

place in which to work as a nondelegable duty. The primary responsibility for the safety of the longshoreman lies with the stevedore.

- B -

Defendant says Charge "B" was misleading and without evidence to support it. First it says there was no evidence that the ship's mate was "supervising and reviewing the unloading operation," nor that he ordered plaintiff to remove a jack at a time when he knew or should have known the container was "then and there being moved by a hustler." Too, even if the longshoreman was directed to move the jack, there was no reason to believe plaintiff would go behind the container. Nor would the direction to move the jack in and of itself constitute negligence, as the mate would have expected plaintiff to exercise reasonable care

in undertaking the removal; that he would do so at a proper time, in a proper manner, and when it would appear reasonably safe for him to do so.

In view of the evidence and the errors in charging the jury, the judgment entered on the verdict of the jury is SET ASIDE and a new trial is awarded.

Counsel shall appear on Monday, September 15, 1975, at 9:00 a.m. to select a new date for the trial of this action.

RICHARD B. KELLAM
U.S. District Judge

At Norfolk, Virginia
September 3, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

STANLEY D. EDMONDS, Plaintiff,	:	CIVIL ACTION NO. 74-339-N
vs.	:	
COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.	:	MEMORANDUM ORDER

Plaintiff, Edmonds, a longshoreman employed by Nacirema Operating Company, Incorporated, a stevedoring company, was injured on March 3, 1974 in the course of his employment as a stevedore while working aboard the SS ATLANTIC COGNAC, a vessel owned by the defendant, Compagnie Generale Transatlantique. This suit proceeds against the owner of the vessel alleging the owner's negligence.

At trial on December 17, 1975 the Court utilized a special verdict form whereby the jury was required to determine, in addition to the issue of

liability, the respective percentages to which the negligence of the plaintiff, the defendant shipowner, and the stevedore, Nacirema, contributed to the plaintiff's injury. The jury also determined the total damage to which the plaintiff would be entitled. The jury returned a verdict in favor of the plaintiff for $100,000.00. They also found that the plaintiff's fault contributed 10%, the shipowner's fault contributed 20%, and the stevedore's fault contributed 70%.

Judgment on the verdict was withheld pending a further inquiry, now completed, on whether plaintiff's recovery should be reduced by the percentage of his own contributory negligence, and allowed as against the shipowner only to the percentage of negligence attributable to that party. On the one hand, the plaintiff's verdict would be reduced from $100,000.00 to $90,000.00 on account of his own 10%

negligence. On the other hand, the reduction would be from $100,000.00 to $20,000.00 if we make shipowner responsible only for his 20% negligence as found by the jury.

A few months ago in this same tripartite type of case, i.e., injured longshoreman, negligent employer-stevedore, and negligent shipowner, Speller, et al.v. American Export Lines (E.D. Va. 1975), Civil Action No. 74-542-N, unreported), we held that it was inequitable for a shipowner to be saddled with the total damage award in favor of an injured longshoreman, to the complete exclusion of the negligence of a negligent employer-stevedore, whose culpability far exceeded that of the shipowner. We were faced then, and again in the present case, with the proposition that a 70% negligent employer-stevedore pays nothing and even recovers the compensation benefits paid by him, while a 20% negligent ship-

owner pays the entire judgment including the repayment of compensation benefits to the employer-stevedore.

In reaching our decision in Speller above, we relied upon Frasca v. Prudential Grace Lines, Inc., 394 F.Supp. 1092 (D.C. Md. 1975) and Shellman v. United States Lines, Inc., 1975 AMC 362 (D.C. Cal.1975). Speller was not appealed, nor reported. This approach appeared compatible with the Senate Report 92-1125 anent the 1972 amendments to the Compensation Act embodied in 33 U.S.C. Sec. 905(b), in which report it was the declared intent that ". . . the vessel shall not be chargeable with the negligence of the stevedore or employees of the stevedore."

In the case at bar we employed similar interrogatories to the jury with the resulting determination that the plaintiff, Edmonds, was 10% percent contributorily negligent, Compagnie Generale

Transatlantique, shipowner, was 20% negligent, and that Nacirema Operating Company, Incorporated, stevedore-employer, was 70% negligent. It was our intent at that time to apply these percentages against the gross amount of the verdict in accordance with the reasoning of Frasca, supra, Shellman, supra, and Speller, supra.

Very recently, however, the Second Circuit in Landon v. Leif Hoegh & Company, 521 F2d 746 (2d Cir. 1975), while recognizing the inequity in allowing the negligent stevedore-employer to escape monetarily unscathed, nevertheless concluded that the inequity was one to be remedied by legislation rather than by the courts.

In addition, the district court decision of Shellman v. United States Lines, Inc., cited above, upon which this court had partially relied, was reversed

on November 21, 1975 by the Ninth Circuit, No. 75-3071. Also recently, the Ninth Circuit in Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, No. 75-1442 (9th Cir., November 21, 1975) has again rejected the district court Shellman reasoning. Additional research has disclosed that Lucas v. "Brinknes" Shiffahrts Ges. v. Northern Metal Co., 379 F.Supp. 759 (E.D. Pa. 1974), Santino v. Liberian Distant Transports, Inc., 75 AMC 1649 (W.D. Wash. 1975) and Hubbard v. Great Pacific Shipping Co., ___F.Supp. ___(D.C. Oregon, June, 1975), likewise have rejected the reasoning which would grant some relief to shipowner by reducing the damages assessable against it to the negligence for which it was accountable percentagewise.

In light of this authority, we, reluctantly, reverse our previous stand. It now appears that a 20% negligent shipowner

must bear the entire brunt of the damage award without contribution from a 70% negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid to the employee. We invite the Court of Appeals of this Circuit to examine this matter.

Judgment will be entered for the plaintiff, Stanley D. Edmonds, against the defendant, Compagnie General Transatlantique, in the amount of $90,000.00, with interest from December 17, 1975, and costs.

It is so ORDERED.

JOHN A. MAC KENZIE
U.S. District Judge

Norfolk, Virginia
March 3, 1976.

UNITED STATES COURT OF APPEALS
Fourth Circuit

STANLEY EDMONDS,
Appellee,

vs. Nos. 76-1545 - 76-1547

COMPAGNIE GENERALE TRANSATLANTIQUE,
Appellant (two cases).

Decided May 6, 1977.

WIDENER, Circuit Judge:

This action arises under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1927,[1] a remedial statute governing suits by longshoremen injured upon navigable waters in the course of their employment. Plaintiff, Stanley Edmonds, a longshoreman employed by Nacirema Operating Company, which was not a party to this case, was injured while unloading rolling cargo containers from the S.S. Atlantic Cognac, a vessel owned by defendant Compagnie

1. The stevedore has not until this time participated in this case.

Generale Transatlantique, at Portsmouth, Virginia on March 3, 1974. Edmonds received statutory compensation benefits in excess of $20,000 from his employer under the statute and, as authorized by 33 U.S.C. Sec. 905(b),[2] instituted an action for damages against the vessel as a third party based upon its alleged negligence.

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2. 33 U.S.C. Sec. 905(b):

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon

(Footnote 2. continued from Page A23)

the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

A jury trial was held in March 1975, resulting in a verdict for Edmonds in the amount of $97,500. Subsequently, however, the district judge granted defendant's motion for a new trial, based upon errors committed by the court in charging the jury.

[1] A second trial was held in December 1975, again resulting in a verdict in Edmonds' favor, this time for $100,000. In response to a special verdict submitted to the jury at the conclusion of the second trial, it was found that Edmonds was 10% contributorily negligent; that the defendant vessel's negligence contributed 20% to the injuries sustained, and that the stevedore employer's negligence contributed 70%. Despite this finding of comparative fault on the part of the stevedore as well as the plaintiff, however, the district court entered judgment against the

vessel owner for $90,000, reducing the award only to the extent of the plaintiff's comparative negligence.[3]

The issues presented for our consideration are these: (1) Did the district court abuse its discretion in ordering a new trial on the basis of instructions propounded to the jury that, in the court's opinion, lacked evidentiary support and imposed a greater duty on the defendant than authorized by the Longshoremen's Act? We think not, and affirm the district court's grant of a new trial. (2) Should the district court have reduced Edmonds' recovery against the vessel owner to an extent commensurate with the vessel's degree of comparative

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3. This reduction of the award to the extent of the plaintiff's negligence was proper on the part of the district court and is unquestioned by the parties to these appeals. See Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

fault in causing the injuries sued upon? This is an issue not previously addressed in this circuit. The district court was at first inclined to order such a reduction, but declined to do so when the Court of Appeals for the Ninth Circuit held to the contrary, reversing a district court judgment in Shellman v. United States, Inc. 528 F2d 675 (9th Cir. 1975). We respectfully do not agree with the Ninth Circuit, and now hold that a mere equitable distribution of liability, and one more consistent with the amended act, is achieved by limiting the vessel owner's liability to the extent of its fault in this case $20,000, plus the amount of the stevedore's lien as set forth below.[3a]

3a. While the issue was expressly reversed, the Third Circuit recently discussed some of the authorities and policy pros and cons of allowing a jointly negligent vessel an equitable credit to the extent of the stevedore's fault in Marant v. Farrell Lines, Inc., No. 76-1383 (3d Cir. 1977) (compare majority and concurring opinions and authorities cited).

I

Edmonds' duties aboard the Atlantic Cognac on the day of his injury consisted of removing chains and jacks used to secure large, movable cargo containers in the hold of the vessel. At the direction of a member of the vessel's crew, Edmonds went behind one of the containers to remove a jack. The rear of the container was about two feet from the side of the ship. As Edmonds was performing this task, a vehicle called a hustler, used to tow the rolling containers off the ship, attempted to engage the container that Edmonds was working behind, causing it to roll backward. Edmonds was pinned between the container and the side of the ship. His allegations of negligence on the part of the vessel consisted of permitting the rolling containers to be loaded on the Atlantic Cognac by stevedores at Rotterdam without applying the

containers' air brakes, and ordering Edmonds to remove the jack from behind a container while a hustler was ready to engage it.

[2,3] Defendant's motion for a new trial centered around two instructions given the jury by the district court, one of which is copied below.[4] It is necessary to discuss only the first of these, Charge A, which instructed that "defendant has the duty of seeing that the cargo is properly stowed."

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4. "Charge A--A vessel owner, under admiralty law, owes the duty of exercising ordinary care toward all persons lawfully aboard the vessel, and the defendant has the duty of seeing that the cargo is properly stowed and he is charged with whatever knowledge it, the defendants, would have acquired as to the nature and characteristics of the cargo carried on the vessel by the exercise of ordinary care to acquaint themselves with the facts, and the defendant was bound to take reasonable precautions in light of such knowledge to protect longshoremen like the plaintiff, Stanley D. Edmonds, who was employed to assist in unloading the cargo."

The district court was not in error in concluding that this charge could be understood as imposing upon the vessel a duty that is no longer permissible under the 1972 amendments to the Longshoremen's Act. As we held in Bess v. Agromar Lines, 518 F2d 738 (4th Cir. 1975), a non-delegable duty to provide a safe place to work is an "outgrowth of the doctrine of seaworthiness and differs significantly from the concept of negligence." 518 F2d at 740 (citations omitted). The 1972 amendments expressly abolished the seaworthiness concept as a basis for imposing liability upon a vessel for injuries to a longshoreman.[5] Only negligence remains under the statute as a basis for such liability, the same duty to exercise ordinary care as in land-based injury cases.[6]

5. 33 U.S.C. Sec. 905(b). See note 2, supra.

(Footnote from page A29)

6. It was the intent of Congress in 1972 to place vessels "in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits." H.R. Rep. No. 92-1441 92d Cong. 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News at p. 4703.

The stowage of the cargo at Rotterdam was under the exclusive control of the Dutch stevedore. There was no evidence of knowledge on the part of the defendant of any dangerous condition, nor that, in the exercise of ordinary care, such knowledge should have been acquired. The instruction that "defendant has the duty of seeing that the cargo is properly stowed" could easily have had the effect of subjecting the vessel to an outmoded theory of liability, that of a non-delegable duty of providing a safe place to work. See Bess, supra. In these circumstances, the grant of a new trial was entirely proper. The district judge was in a better position than are we to judge the meaning and connotation of the words of his own instruction when read in context with the balance of the charge, and we cannot say setting aside the verdict was an

abuse of discretion.

II

[4] In the 1972 amendments, Congress sought to strike a balance between the relative rights and liabilities of the three parties generally involved in litigation under the Longshoremen's Act, the injured longshoreman, his stevedore employer, and the owner of the vessel. While statutory compensation payments (increased considerably in 1972) constitute the stevedore's exclusive liability to its injured employee, irrespective of fault,[7] a vessel whose negligence was a proximate cause of the injury may be held liable to the longshoreman for damages.[8]

In contrast to pre-1972 practice,[9] the vessel is no longer subject to suit

7. 33 U.S.C. Sections 904, 905(a).

8. 33 U.S.C. Section 905(b).

9. A more thorough analysis than will be

(Footnote 9 continued from Page A31)

attempted here of the Act prior to 1972, as well as of the historical backdrop of admiralty law against which the Act has operated, can be found in Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974). See also Shorter, In the Wake of the 1972 Amendments to the L. & H.W.C.A.:the Vessel's Rights Against the Stevedore, 7 J. of Maritime Law and Commerce 671 (1976); Cohen and Dougherty, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 19 N.Y.L. Forum 587 (1974).

by a longshoreman for breach of a warranty of seaworthiness, an absolute, non-delegable duty to provide a safe place to work.[10] See Bess, supra. It is liable only for its own negligence. And, in return, the negligent vessel may no longer bring suit against the stevedore whose joint negligence contributed to the injury based on breach of a warranty to perform duties in a workmanlike manner. Such suits had been held not to be precluded by the exclusivity provision of 38 U.S.C. Section 905(a), as the statute was then written, in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124, 76 S.Ct. 232, 100 L. Ed. 133 (1956). It was the intent of the 1972 amendments to eliminate this circuitous system of litigation and to restore to the stevedore

10. The availability of relief against a vessel on account of a vessel's unseaworthiness was extended to longshoremen performing work aboard ship in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

the exclusivity of liability for compensation payments under the statute only. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. and Admin. News, p. 4698.

[5] It is this remedial exclusivity, however, that gives rise to the present problem of whether and how to apportion liability in cases in which the stevedore and the vessel are jointly negligent in causing the injuries sued upon. While admiralty law has, over the years, demonstrated considerable flexibility in adapting to rules of divided damages when more than one party has been at fault in causing injury, Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 110, 94 S.Ct. 2174, 40 L. Ed. 2d 694 (1974), such a rule may not obtain when one wrongdoer enjoys statutory immunity. The Longshoremen's Act does not provide for contribution against

a jointly negligent stevedore, and the Supreme Court has held that to engraft such a remedy judicially could disrupt the balance of rights and liabilities Congress sought to achieve in the statutory scheme. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952); see Cooper Stevedoring, supra. Therefore, under the statute, if the 20% negligent vessel in the present case were held liable for the full $90,000 jdugment, it would have no recourse against the 70% negligent stevedore.

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11. Cooper Stevedoring made clear that the rule of noncontribution enunciated in Halcyon is limited to cases in which the party against whom contribution is sought enjoys a statutory immunity from tort liability. Thus, contribution was permitted against a stevedoring company which was a joint tortfeasor, but which was not the employer of the injured longshoreman and therefore had no statutory liability or immunity.

Cooper arose before the 1972 amendments, but in dicta it indicates that even after those amendments the Halcyon days are not over and the case remains "good law on its facts."

[6] In eliminating the vessel's cause of action in contract against the stevedore approved in Ryan, Congress intended as a quid pro quo that vessels sued under the Act would no longer be liable for the negligence of stevedores, as they often had been pursuant to the seaworthiness doctrine. It was accordingly perceived that the Ryan action would no longer be necessary.[12] The House Report discussing elimination of unseaworthiness as a basis of liability reflects this Congressional determination that the liability of a vessel was to be

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12. "Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News at p. 4704.

confined to its own negligence.[13] Congress did not intend to continue to subject vessels to liability for the negligence of stevedores, while eliminating their only available means of recourse.

We fail to see how a simple reduction in a vessel's monetary liability will result in the type of circuitous actions Congress sought to eliminate in 1972, as was suggested by the court in Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974). Nor do we accept the proposition advanced by the Ninth Circuit in Shellman, supra, that an equitable credit somewhat like we adopt here imposes an unjustified

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13. "Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-created doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act." Id. at p. 4703.

burden on injured longshoremen. They have no inherent right to recover from a vessel damages caused by the negligence of a stevedore. To the extent the longshoreman receives a somewhat lesser amount than he otherwise would have, his complaint lies not with the result reached in this case, but more basically with the compensation scheme of the Act that prevents him from recovering damages from his employer, for a concomitant of the stevedore's no-fault liability is the exclusivity of the compensation remedy against it. Thus, even as the longshoreman receives a lesser recovery, he benefits from one of the Act's many trade-off; he becomes entitled to statutory benefits without having to prove fault on the part of anyone. As will be later apparent, he also benefits from the negligence of the vessel, but only to the extent of its own fault.

It has also been suggested that any reduction of liability to the benefit of a negligent vessel would amount to a form of contribution against the jointly negligent stevedore prohibited by the Supreme Court in Halcyon. See Shellman, supra; Landon v. Lief Hoegh & Co., 521 F2d 756 (2d Cir. 1975). The only apparent circumstance in which this could be true would be where the ability of the stevedore to recoup its compensation lien,[14] acquired pursuant to its right of statutory or equitable subrogation in the plaintiff's recovery, see The Etna, 138 F2d 37 (3d Cir. 1943), would be diminished on account of the vessel's reduced liability to less than the amount of the lien as apparently may be true here. Our solution also avoids that result except when the total longshoreman's

14. Compensation payments made to the plaintiff prior to judgment.

judgment is less than the lien. Cf. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 89 S.Ct.1144, 22 L. Ed. 2d 371 (1969). See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953).

While the stevedore is not a party to this case, its lien looms large in any decision we may make here. This is so because the statute, 33 U.S.C. Section 933(b), provides that, after an award, acceptance of compensation by the longshoreman operates as a statutory assignment of all the right of action of a longshoreman against the vessel unless the longshoreman shall commence an action against the vessel within six months after the award, and the rule of The Etna, supra, which seems generally accepted, provides for the equitable subrogation of a stevedore, to the extent of compensation payments made, in any recovery made by

the longshoreman against the vessel in all events. If we were left purely to our own devices, an attractive holding might be to bar the stevedore from asserting an equitable lien if it were negligent, but we think this would be an artificial distinction to announce such a rule when the statute has in terms provided for an assignment after an award in some instances. Such a holding by us might well lead to the stevedore's withholding of voluntary payments after an injury, knowing that after an award its lien would at least many times in effect be perfected by statute. Again, were the much older form of procedure still in effect, that the longshoreman had to elect which remedy to pursue, we might have less difficulty with the case, for a voluntary election on the part of the longshoreman might justify lowered payments to him which otherwise might seem

to be an injustice. Under 33 U.S.C. Section 933(a), however, the longshoreman "need not elect."

[7] In arriving at our decision, we first have to keep in mind the statute. 33 U.S.C. Section 933(b) preserves a lien to the stevedore in many instances. See also The Etna, supra. 33 U.S.C. Section 905(b), as amended in 1972, preserves to the longshoreman a right "caused by the negligence of a vessel." We think the stevedore's lien and the right against the vessel for negligence should be preserved and should not be diminished so far as possible except by the longshoreman's contributory negligence. We do not think the statute contemplates a reduction of the stevedore's lien on account of its contributory negligence.

With these principles in mind, we think that two recent cases offer a

solution to the problem which is consistent with the intent of the statute, that is to say the preservation of the stevedore's lien the preservation of the longshoreman's right of action for negligence against the vessel, and holding of the vessel only for its own negligence. The cases are Cooper, supra, and United States v. Reliable Transfer Company, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975).

[8] Both of those cases trace the history of damages in admiralty cases more thoroughly than we will do here. Suffice it to say that we read them as emphasizing that courts of admiralty should formulate "flexible and fair remedies in the law maritime," Reliable Transfer, p. 409, 95 S.Ct. p. 1715. And in Cooper the court states: ". . . it is fair to say that application of the rule of damages between joint tortfeasors

in admiralty cases has been as broad as its underlying rationales." pp. 110-11, 94 S.Ct. p. 2177.

In the Cooper case, the court approved a divided damage award between a negligent vessel and a negligent stevedore when the longshoreman plaintiff was not an employee of the negligent stevedore. It is true that in Cooper the division of negligence by the court between the stevedore and the vessel was half and half, but that case followed the well established maritime rule of an equal division of damages upon a finding of concurrent fault, the law maritime at that time, and in all events in note 3 the court recited that the district court had divided the damages equally because it was "the only apportionment of fault it could reach on the evidence," and reserved the question of whether contribution should be based on an equal

division of damages or should be relatively apportioned with the degree of fault.

Following Cooper came Reliable Transfer which departed from the traditional law maritime of an equal division of damages in cases of contributory fault and decided that in a collision or standing case "liability for such damages is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault, or when it is not possible fairly to measure the comparative degree of their fault," p. 411, 95 S.Ct. p. 1715.

[9,10] With those cases in mind, and keeping in view the statutory objectives and the Supreme Court opinions on the subject, we think the most just result in this case obtained, and one which

is quite in keeping with the principles which we have cited, is one in which we preserve the stevedore's lien, we preserve the longshoreman's right of action against the vessel for negligence, both contemplated by the statute, and, so far as possible, only hold the vessel for its own negligence.

Accordingly, we are of opinion that a judgment against a vessel by a longshoreman in a case such as we have here, where both the vessel and the stevedore are negligent, should be limited to a sum equal to that part of the whole measured by its own fault, here $20,000, plus any valid lien the stevedore may have on the recovery by the longshoreman, but of course not to exceed the whole amount of the possible award against the vessel, which here, for example, is $90,000. Since the stevedore has asserted no claim against the vessel, we do not

consider any effect the 1972 amendments may have had on Marine Terminals, supra.

The judgment of the district court is accordingly vacated and the case is remanded with directions to enter judgment against the vessel in favor of the longshoreman in the amount of $20,000, and in the event, and only in the event, the stevedore asserts and proves in the district court a valid lien on the recovery of the longshoreman, to enter such additional judgment in favor of the longshoreman against the vessel in such amount, however subject to the lien of the stevedore.[15]

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15. The total of the stevedore's lien and the $20,000 judgment in favor of the longshoreman here will be less than $90,000, so we have no occasion to consider the result in the event they are greater.

Our result here is not inconsistent with Halcyon because we have not required contribution from the stevedore, and with Pope & Talbot because any reduction in the vessel's liability is not at the expense of the stevedore.

VACATED AND REMANDED

HALL, Circuit Judge, dissenting:

Respectfully, I dissent. It appears that the majority opinion is based upon principles of justice, equity, and fairness, instead of the provisions of the Act. The district court was correct in entering judgment for the plaintiff against the vessel owner only for the entire sum of $90,000 because the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. (especially 33 U.S.C. Section 905(b) are clear and require this result. Even if the present rule is arguably a harsh one, the change should come from Congress, not the courts. See Marant v. Farrell Lines, Inc., 550 F2d 142 151-152 (3rd Cir. 1977, Van Dusen concurring).

Under the Act, as amended, the ship is to bear the entire responsibility for

both its liability and that of the stevedore-employer.

I would, therefore, affirm. Dodge v. Mitsui Shintaku Ginko, 528 F2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed. 2d 188 (1976); Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936, 96 S.Ct. 1668, 48 L.Ed. 2d 177 (1976); Marant v. Farrell Lines, Inc., supra, (dicta-Van Dusen concurring).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STANLEY EDMONDS,
Appellee,

vs. Nos. 76-1545
76-1546
COMPAGNIE GENERALE 76-1547
TRANSATLANTIQUE,
Appellant

Decided June 22, 1978

HAYNSWORTH, Chief Judge:

We have for decision the question of pro ratior of damages payable by a shipowner to an injured longshoreman when the injury was ocassioned by the combined negligence of the shipowner, the stevedore and the injured longshoreman. Our conclusion is that the ship may be required to pay that proportion of the total damages which matches its proportion of fault. We do not now decide what interest the stevedore has in the longshoreman's recovery, for the stevedore is not now a party to these proceedings.

I

While working as a longshoreman aboard a ship owned by Compagnie Generale Transatlantique, Edmonds was severely injured. A first trial resulted in a verdict in Edmonds' favor, but the district judge awarded a new trial because of errors in the charge. A second trial again resulted in a verdict in Edmonds' favor, and the damages were assessed at $100,000. The jury determined that the injuries were the result of concurrent negligence on the part of the stevedore, the ship and the longshoreman; the stevedore's negligence contributed 70% of the fault, the ship's 20% and the longshoreman's 10%.

With these determinations by the jury, the district judge concluded that the longshoreman was entitled to a judgment against the shipowner in the amount of $90,000. Because the

longshoreman himself was found to have been 10% at fault, the $100,000 damage assessment was reduced by 10%. No reduction was allowed on account of the negligence of the stevedore.

The case was initially heard by a panel of this court. A majority of the panel held that the damage assessment should be further reduced on account of the contributory fault of the stevedore to the sum of $20,000, computed on the basis of the ship's contribution to the total fault, plus any amount which the stevedore should recoup from the longshoreman by virtue of the lien in its favor as a result of having made compensation payments to the longshoreman. A majority of the judges in regular active service voted for rehearing en banc, and a majority of the en banc court now concludes that the shipowner can be required to pay no more than $20,000.

Before 1972 the exposure of ships to liabilities for injuries to longshoremen was comparatively slight except insofar as reparations for such injuries occasioned higher stevedoring costs. The ship was held to owe to a longshoreman a duty to provide a seaworthy ship, comparable to its duty to seamen, but if the unseaworthy condition had been created by the stevedore, the ship was entitled to indemnity from the stevedore under an implied warranty of workmanlike service. See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

Under that state of the law, heavy costs were imposed upon the stevedore. It was required to provide workmen's compensation benefits to an injured longshoreman in any event, and if the longshoreman sued the ship and was

successful in obtaining a verdict on the basis of an unseaworthy condition created by his fellow workers, the stevedore was required to indemnify the ship, in effect paying to its employee the damage award.

In 1972 the Congress decided to change that. It amended the Longshoremen and Harbor Workers' Compensation Act by greatly increasing the amount of benefits payable, without regard to fault, to injured longshoremen. It abolishes the longshoreman's right of action against the ship on unseaworthiness claims, and it abolished the ship's right of contribution or indemnity from the stevedore. The right of action against the ship for injuries caused by the ship's own negligence, however, was expressly preserved, and the apportionment of the damages problem we face is the consequence of that preservation.

The critical section of the amended

statute is Section 905(b)[1] which reads:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reasons thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available

1. 33 U.S.C. Section 905(b).

under this chapter.

If read in absolute terms, the first sentence and the second sentence are in conflict in every case in which fault is found on the part of both the ship and the stevedore. The first sentence says that if the injury is caused by the negligence of a vessel the longshoreman may recover, but the second sentence says he may not recover anything of the ship if his injury was caused by the negligence of a person providing stevedoring services. The sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it. They may be harmonized only if read in apportioned terms. The evident meaning and intention of the Congress was to provide for liability of the ship to the extent its fault contributed to the

injury, while insulating it against liability to the extent that the stevedore's fault contributed to the injury. So read, the sentences are harmonious.

The longshoreman, looking to the many references in the statute and its legislative history to the principles of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tort feasor, but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tort feasors, or has been supplanted by a system of comparative negligence. In the 1972 amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any

right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so. More importantly, the second sentence of Section 905(b) seems a firm declaration that the ship should not be required to pay for injuries to the extent that they were caused by people providing stevedoring services.[2]

2. There is nothing explicitly enlightening in the legislative history. The many references in the history to the principles of land-based negligence law are a slender reed upon which to base an inference of Congressional intent for the importation of the common law principle of complete responsbility on the part of each of several joint tortfeasors. The more likely inference from that language is a complete negation of the non-delegable duities concepts of admiralty law whether or not framed in terms of warranties of seaworthiness. See Hurst v. Triad Shipping Co., 554 F2d 1237, 1247-1253 (3rd Cir. 1977). Thus, it was repeatedly emphasized that the vessel would be chargeable only with its own negligence and that it would not be chargeable with

(Footnote 2 continued on Page A57a)

(Footnote 2 continued from Page A57)

the negligence of the employees of the stevedore. H.R. Rep. No. 92-1441, U.S. Code Cong. & Adm. News, 92d Congres. 2d Sess. 4698, 4703, 4704 (1972). The language of the House Report strongly suggests an intention that the vessel be responsible only for its proportionate part of any negligence when there is also fault on the part of others. See Vickery, Some impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63, 66 (1974). This reading of the legislative history suggests that Congress made a reasonable trade-off, in which the vessel's liability was limited to its proportion of the fault while in return the vessel owner was absolutely deprived of all rights of indemnity by or contribution from the stevedore.

Our conclusion is consistent with the trend to expand the application of the doctrines of comparative negligence, and is reinforced by the policy considerations which underly that expansion. Those considerations were eloquently stated by Mr. Justice Stewart in his opinion for the Court in United States v. Reliable Transfer Co., 421 U.S.397 (1975). We need not repeat them here, but they are wholly consistent with a reasonable reconciliation of the first sentence of Section 905(b) and its successors.

From the longshoreman's point of view, this is not a harsh result. He is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury. Our holding

is only that he may not recover from the ship damages attributable to the neglect or actions of his fellow longshoremen or others than the ship's crew.

We are aware, of course, that our decision today is in conflict with decisions in the Fifth and Ninth Circuits, see Samuels v. Empresa Lineas Maritimas Argentinas, ____F2d ____ (5th Cir. May 26, 1978); Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976). Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976). See also Hubbard v. Great Pacific Shipping Co. Monrovia, 404 F.Supp (1242) (D. Ore. 1975); Santino v. Liberian Distance Transports, Inc., 405 F. Supp. 34 (W.D. Wash. 1975); Solsvik v. Maremar Compania Naviera, S.A., 399 F.Supp. 712 (W.D. Wash. 1975). But see Croshaw v. Koninklijke Nedlloyd,

B.V. Rijswijk, 398 F.Supp. 1224 (D.Oregon 1975) and its discussion of the comparative negligence and "equitable credit" doctrines.

II

The parties urge us to decide the next and related question of the rights of the stevedore to the $20,000 fund payable by the ship as a result of our decision. It has a statutory lien upon the fund as a result of its payment of workmen's compensation benefits, and its rights as lienor may be or may not be subject to adjustment as a consequence of the fact that the verdict was reduced to the extent that the stevedore's fault contributed to the injury. But the stevedore is not a party in this case and has not been heard from. The answer to the question will affect the stevedore involved here and other stevedores very

substantially, and its rights should not be adjudicated without its presence.

We suggest that the shipowner pay the $20,000 fund into the court and interplead the stevedore and the longshoreman so that their relative rights might be determined in a proceeding in which each may be heard. In future cases, the stevedore might be made a party plaintiff so the rights of all parties may be adjudicated in one proceeding.

III

Edmonds appeals from the decision of the district court to grant a new trial after the initial verdict in his favor. We find no error in that decision and affirm it.

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded for the entry of judgment against the ship consistently

with this opinion.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

I respectfully dissent.

The legislative history of the 1972 amendments to the L. & H.W.C.A. reveals beyond peradventure that congress intended to make a shipowner responsible for negligent injury to a longshoreman working aboard ship in the employ of a stevedore to the same extent a property owner on land would be responsible to an employee of his independent contractor.

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
> . . . .
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the

> same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned . . . .
>
> . . . .
>
> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land . . . .
>
> . . . .
>
> In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury.

H. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4703-05.

The 1972 amendments to the L.&H.W.C.A., among other things, did the following: (1) increased employee's level of benefits, (2) eliminated the liability of

the shipowner for warranty of seaworthiness, (3) placed the injured employee in the same position as an employee injured in non-maritime employment ashore, and (4) gave the employer-stevedore a statutory lien against plaintiff's recovery.

The first sentence of Section 905(b) gives the employee a cause of action for negligence against the vessel. To recover, injury need not be caused solely by the negligence of the vessel, but may be based on any negligence which was a contributing proximate cause. This is not different from the right a land-based employee would have against the land owner. (Maritime law does give a shipowner the right to a reduction to the extent of the plaintiff's comparative negligence, 10% or $10,000 in this case.)

The second sentence is not in conflict with the first, but simply says

that the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore. This provision, likewise, is in line with land-based law, and is in perfect alignment with the first sentence which gives a right of action against the vessel for its own negligence. It is to be remembered that the longshoremen's workmen's compensation benefits do not depend upon the negligence of the stevedore, but, like workmen's compensation benefits for landbased workmen, are paid for injuries received on the job without proof of fault.

The common law did not permit division of damages among tortfeasors according to degrees of comparative negligence, and such change in the law should not come from the courts. Some common law states, by legislation, do permit comparative negligence among tortfeasors, but they are in the minority. Prosser,

Law of Torts Section 67, at 434-35 (4th Ed 1971).

The 1972 amendments eliminate any right the vessel may have to recover over against its stevedore for damages it may have to pay to an injured longshoreman for injury aboard ship. The effect of this is to prevent contribution by the stevedore or diminution to the longshoreman for any benefits he may receive from the stevedore.

In the matter of the stevedore's lien, I believe that the stevedore, even though negligent, has the right to be compensated out of the recovery by the longshoreman and that he has a compensation lien protecting that right.

The majority opinion seeks to obtain the "most just result." I have no quarrel with a just result; however, it is not to be achieved in face of a constitutional act of congress. If

inequities result from this statute, perhaps congress will make necessary changes to bring about more equitable results.

The district court decided this case in line with the decisions in Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), and Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F2d 669 (9th Cir. 1975). I believe these decisions are correct. See also Hurst v. Triad Shipping Co., 554 F2d 1237 (3rd Cir. 1977).

Finally, the majority's decision to depart from the established law created by congress and interpreted by our sister circuits has profound practical and policy considerations for all parties to maritime injuries - the longshoreman, the stevedoring company and the vessel owner.

For the longshoreman himself, the amount of his tort recovery now becomes

totally dependent on a new and judicially created "situs test." From the border of Washington State past Texas, Louisiana, and north to Georgia, and from Delaware to Maine, the injured longshoreman recovers a full award against a vessel, reduced only by his own contributory negligence. The maritime areas of the states which comprise the Fourth Circuit now stand alone in their reduction of the longshoreman's damage award due to the negligence of the stevedoring company.

For the shipowners and stevedores, the result becomes equally anomalous. Shipowners, stevedoring companies and presumably the insurance industry which stands behind shipping, no matter where they are based, must all wear two hats -- one for all shipments in every other judicial circuit but ours and a very special hat for the Fourth Circuit and

its shipping ports.

Thus, much much more than a technical difference between our sister circuits is involved; this dispute should be resolved for the benefit of all parties, small and large alike.

I would affirm.

WIDENER, Circuit Judge, dissenting:

I would decide the case in accordance with the previous opinion of the majority of the panel found in 558 F2d 186 (4th Cir. 1977).